

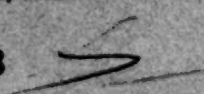
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(17)

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 253 

DOROTHY SCOTT, PLAINTIFF IN ERROR,

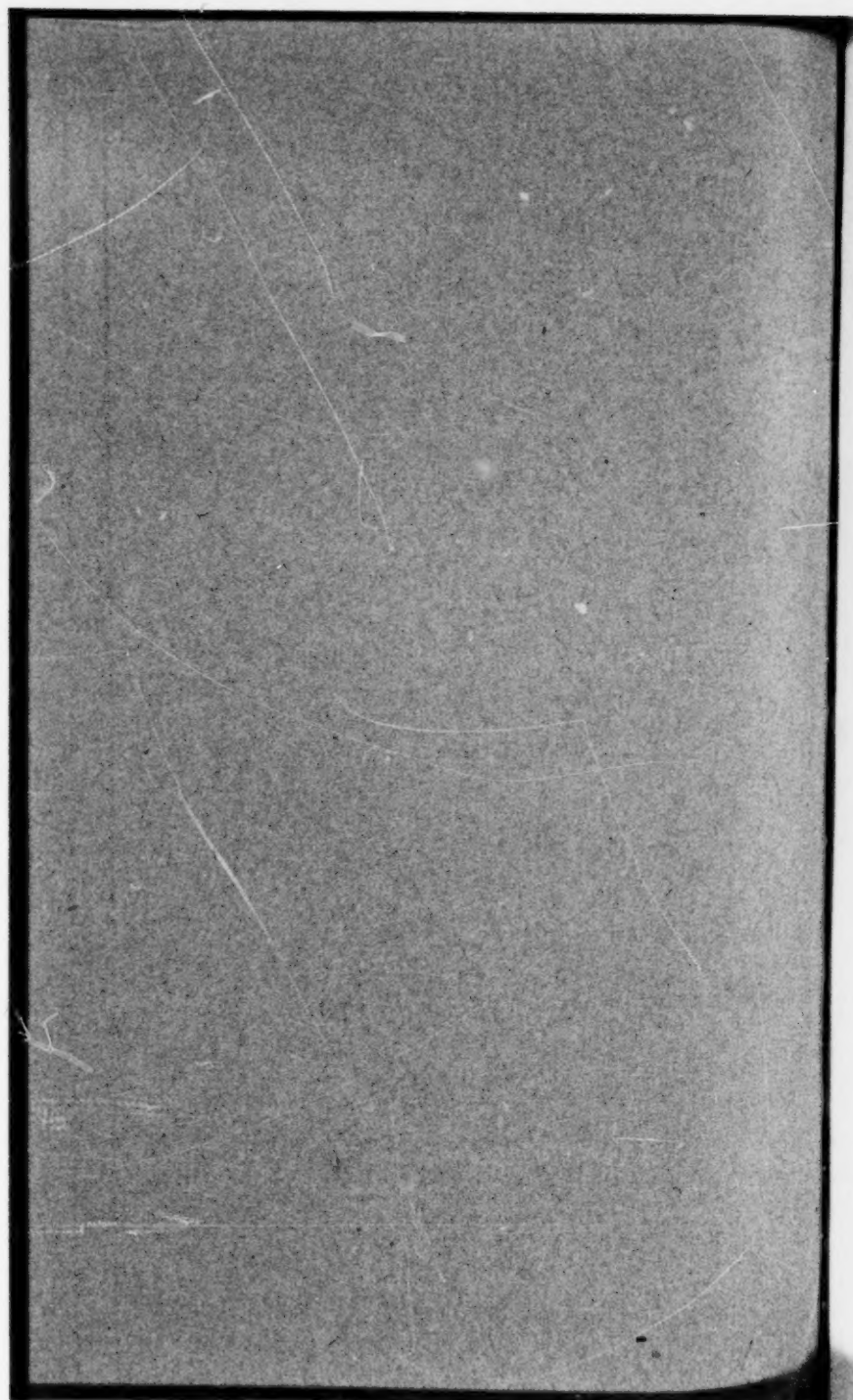
VS.

**J. A. PAISLEY, MRS. FANNIE PAISLEY, CLAUD
BRACKETT, ET AL.**

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA

FILED JANUARY 21, 1926

(30,822)



(30,822)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 253

DOROTHY SCOTT, PLAINTIFF IN ERROR,

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J. A. PAISLEY, MRS. FANNIE PAISLEY, CLAUD
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IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA

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[fol. 1]

IN SUPREME COURT OF GEORGIA

WRIT OF ERROR—Filed Dec. 26, 1924

UNITED STATES OF AMERICA, ss:

[Seal of the U. S. District Court, N. D. Georgia.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Georgia, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Dorothy Scott, plaintiff in error, and J. A. Paisley, Mrs. Fannie Paisley, Claud Brackett and James I. Lowry, Sheriff, defendants in error, wherein was drawn in question the validity of statutes of said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Dorothy Scott as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Wm. H. Taft, Chief Justice of the United States, the twenty-fourth day of December, in the year of our Lord one thousand nine hundred and twenty-four.

O. C. Fuller, Clerk United States District Court, Northern District of Georgia.

Allowed by Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia.

[File endorsement omitted.]

[fol. 3] CITATION—In usual form, showing service on Walter McElreath et al.; filed Dec. 26, 1924; omitted in printing

[fol. 4]

IN SUPREME COURT OF GEORGIA

No. 3892

DOROTHY SCOTT

vs.

J. A. PAISLEY, MRS. FANNIE PAISLEY, CLAUD BRACKETT, and JAMES
I. LOWRY, Sheriff

PETITION—Filed Dec. 24, 1924

To the Honorable R. B. Russell, Chief Justice of the Supreme Court
of Georgia:

The petition of Dorothy Scott, by her attorneys, Hooper Alexander and Paul Donehoo, hereby sets forth that on the 30th day of September, 1924, the Supreme Court of the State of Georgia entered a final order and judgment herein in favor of J. A. Paisley, Mrs. Fannie Paisley, Claud Brackett and James I. Lowry, Sheriff, against Dorothy Scott, in which final order and judgment, and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of said Dorothy Scott, all of which will in more detail appear from the assignment of errors which is filed with this petition.

That the Supreme Court of the State of Georgia is the highest court of said State in which a judgment in this suit and in this matter could be had.

Wherefore: Your petitioner prays that a writ of error may issue in this behalf from the Supreme Court of the United States to the Supreme Court of the State of Georgia, for the correction of the errors complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States.

This 24th day of December, 1924.

Hooper Alexander, Paul Donehoo, Attorneys for Petitioner.

[File endorsement omitted.]

[fol. 5]

IN SUPREME COURT OF GEORGIA

[Title omitted]

PRAYER FOR REVERSAL—Filed December 24, 1924

And now comes said plaintiff in error, and with her petition for writ of error, presents this her prayer for reversal of the judgment of the Supreme Court of Georgia, entered on the 30th day of Septem-

ber, 1924, affirming the judgment of the Superior Court of Fulton County, Georgia of June 8, 1923, dismissing the petition filed in said Superior Court on the 13th day of February, 1923, as amended on the 27th day of March, 1923, and on the 29th day of May, 1923, praying for the recovery of land and for other relief, wherein the said Dorothy Scott was plaintiff and the said J. A. Paisley, Mrs. Fannie Paisley, Claud Brackett and James I. Lowry, Sheriff, were defendants, all of which matters are more fully set out in the petition or writ of error. And she further prays for reversal of the order of said Superior Court dismissing said petition.

Hooper Alexander, Attorney for Plaintiff in Error, 1216 Healey Building, Atlanta, Georgia. Paul Donehoo, Attorney for Plaintiff in Error, 312 Georgia Savings Bank Building, Atlanta, Georgia.

[File endorsement omitted.]

[fol. 6] IN SUPREME COURT OF GEORGIA

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Dec. 24, 1924

Now comes the plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment in the above entitled matter, there is manifest error in this, to-wit:

First. The Court erred in holding that the provisions of an Act of General Assembly of Georgia approved August 27th, 1872, entitled "An act to amend an act entitled "An Act to provide for the sale of property in this state to secure Loans and other debts," as the same were enlarged and amplified by the provisions of the first section of an Act of the General Assembly of Georgia, approved December 17th, 1894, entitled "An Act to provide for the levy and sale of property where the defendant has an interest therein but does not hold the legal title"—which said provisions are embodied in and constitute Section 6037 of the Civil Code of Georgia of 1910—and said Code Section 6037 are not in conflict with and in violation of the Fourteenth Amendment of the Constitution of the United States, for that the State of Georgia through said provisions of said statutes, assumes and seeks:

(a) To deprive the plaintiff in error and other citizens of the United States of property without due process of law.

(b) To deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the State of Georgia the equal protection of the laws.

Second. The Court erred in not holding that said provisions of said statutes and that said Code Section 6037 are in conflict with and in violation of the Fourteenth Amendment of the Constitution of the [fol. 7] United States in that the State of Georgia, through said provisions of said statutes, and through said Code Section assumes and seeks: (a) to deprive the plaintiff in error and other citizens of the United States of property without due process of law; (b) to deny to the plaintiff in error and other citizens of the United States, the equal protection of the laws.

3. The Court erred in holding that plaintiff in error is not, by said provisions of said statutes and by said Code Section, deprived of property without due process of law.

4. The Court erred in not holding that plaintiff in error is, by said provisions of said statutes and by said Code Section, deprived of property without due process of law.

5. The Court erred in holding that plaintiff in error in being deprived of her property under said provisions of said statutes and under said Code Section, was accorded due process of law.

6. The Court erred in not holding that plaintiff in error in being deprived of her property under said provisions of said statutes and under said Code Section, was not accorded due process of law.

7. The Court erred in holding that to divest plaintiff in error of her property by a sale had pursuant to a judgment rendered in a suit to which she was not a party, of which she had no notice, and in the course of which she was accorded no opportunity to defend her rights in said property, as authorized by said provisions of said statutes and by said Code Section, was not to deprive plaintiff in error of her property without due process of law.

8. The Court erred in not holding that to divest plaintiff in error of her property by a sale had pursuant to a judgment rendered in a suit to which she was not a party, of which she had no notice, and in the course of which she was accorded no opportunity to defend [fol. 8] her rights in said property, as authorized by said provisions of said statutes and by said Code Section, was to deprive plaintiff in error of her property without due process of law.

9. The Court erred in holding that to divest plaintiff in error of her property without any judicial proceedings to which she was a party, as authorized by said provisions of said statutes and by said Code Section, was not to deprive plaintiff in error of property without due process of law.

10. The Court erred in not holding that to divest plaintiff in error of her property without any judicial proceeding to which she was a party, as authorized by said provisions of said statutes and by said Code Section, was to deprive plaintiff in error of property without due process of law.

11. The Court erred in holding that said provisions of said statutes and said Code Section do not deny to plaintiff in error the equal protection of the laws.

12. The Court erred in not holding that said provisions of said statutes and said Code Section do deny plaintiff in error the equal protection of the laws.

Heoper Alexander, Paul Donehoo, Attorneys for Plaintiff in Error.

[File endorsement omitted.]

[fol. 9]

IN SUPREME COURT OF GEORGIA

[Title omitted]

PRECIPUE FOR TRANSCRIPT OF RECORD—Filed Jan. 7, 1925

To the Clerk of said Court:

By agreement and stipulation among counsel for the parties to the above stated case, you are hereby requested to take a transcript of record to be filed in the Supreme Court of the United States, pursuant to a Writ of Error allowed in the above entitled cause, and to include in such transcript of record, the following, and no other papers:

The original petition filed by plaintiff; the demurrer of J. A. Paisley, Mrs. Fannie Paisley and Claud Brackett to said petition; the amendment to plaintiff's petition filed March 27th, 1923; the amendment to plaintiff's petition filed May 29th, 1923; the judgment rendered on the demurrer of J. A. Paisley, Mrs. Fannie Paisley and Claud Brackett, by the Honorable George L. Bell, Judge of the Superior Court, Atlanta Circuit, dated June 8th, 1923; the bill of exceptions filed by plaintiff to said judgment; the judgment and opinion of the Supreme Court of Georgia in said case; plaintiff in error's petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of Georgia, allowed December —, 1924; her prayer for reversal; her assignment of errors; the Writ of Error; the citation; and the bond given by plaintiff in error upon the issuance of said citation.

This 31st day of December, 1924.

Paul Donehoo, Attorney for Plaintiff in Error. McElreath & Scott, Attorneys for J. A. Paisley, Mrs. Fannie Paisley, and Claud Brackett. Napier, Wright & Wood, Attorneys for J. I. Lowry, Sheriff.

[File endorsement omitted.]

[fols. 10 & 11] **BOND ON WRIT OF ERROR FOR \$500**—Approved and filed Dec. 26, 1924; omitted in printing

[fol. 12] **IN SUPREME COURT OF GEORGIA**

[Title omitted]

Bill of Exceptions and Order Settling Same—Filed in Superior Court July 10; in Supreme Court July 26, 1923

Be it remembered, in the case of Dorothy Scott vs. J. A. Paisley, Mrs. Fannie Paisley, Claud Brackett and James I. Lowry, Sheriff, the same being an equitable petition filed by the plaintiff against the defendants in the Superior Court of Fulton County, Georgia, that the defendants having interposed their general demurrer to plaintiff's petition, and plaintiff having twice amended her petition, and defendants having renewed their demurrer to said petition as amended.

The said demurrer came on for a hearing before the Honorable George L. Bell, Judge of said Court, on the 8th day of June, 1923, and after argument of counsel thereon, the Court entered an order sustaining said demurrer, and dismissing plaintiff's petition.

To the entering of said order sustaining said demurrer, plaintiff in error then and there excepted, now excepts, and assigns the same as error; and says that the same was contrary to law, that the said petition set forth a good cause of action against each and all of the defendants therein named, and that said demurrer should have been overruled.

Said order constituted a final determination of said cause in said Court, adverse to plaintiff in error.

Plaintiff in error specifies as material to a clear understanding of the errors complained of, the following portions of the record in said case:

- (1) Plaintiff's original petition, omitting process and service.
- [fol. 13] (2) The amendment to plaintiff's petition allowed on the — day of April, 1923, together with the order of Court, allowing same.
- (3) The amendment to plaintiff's petition allowed on the 25th day of May, 1923, together with the order of Court allowing same.
- (4) The demurrer of defendants to plaintiff's petition.
- (5) The order of Court sustaining said demurrer.

And now comes plaintiff in error, within the time allowed by law, and presents this, her bill of exceptions, and prays that the same be certified by the Court as true, in order that the errors herein complained of may be reviewed and corrected.

Paul Donahoo, 312 Flat Iron Building, Atlanta Ga.; N. T. Anderson, Jr., 312 Flat Iron Building, Atlanta, Ga., Attorneys for Plaintiff in Error.

I do certify that the foregoing bill of exceptions is true, and specifies all the record material to a clear understanding of the errors complained of. And the Clerk of the Superior Court of Fulton County is hereby directed to make out a complete copy of such portions of the record as are in this bill of exceptions specified, and certify them as such, and cause them to be transmitted to the October Term, 1923, of the Supreme Court of Georgia, in order that the errors alleged to have been committed, may be considered and corrected.

This 28th day of June, 1923.

Geo. L. Bell, Judge S. C. A. C.

[fols. 14 & 15] Due and legal service of the above and foregoing bill of exceptions is hereby acknowledged, copy received. All other and further notice and service waived.

This 28th day of June, 1923.

McElreath & Scott, Silvey Building, Atlanta, Ga., Attorneys
for Defendants in Error.

[File endorsement omitted.]

[fol. 16] IN SUPERIOR COURT OF FULTON COUNTY

PETITION—Filed Feb. 13, 1923

The petition of Dorthy Scott respectfully shows to the Court the following facts:

1. That J. A. Paisley, Mrs. Fannie Paisley, Claud Brackett and James I. Lowry, the defendants herein, are all residents of Fulton County, Ga., the said James I. Lowry being Sheriff of said County and being sued as such.

2. On the 9th day of January 1917, the said Mrs. Fannie Paisley owned all that tract or parcel of land lying and being in land lot 140 of the 14th District of Fulton County, Ga., more particularly described as beginning at a point on the east side of Atwood street in the City of Atlanta, one hundred and ninety nine and two tenths feet south of the southeast corner of Atwood street and Lucile Ave., said beginning point being on the south side of a fifteen foot alley which runs parallel with Lucile Ave., extending thence south along the east side of Atwood St., fifty feet; thence east, parallel with the alley aforesaid, one hundred and eighty five feet; thence north parallel with Atwood Street, fifty feet to the south side of said alley, thence west along the south side of said alley, one hundred and eighty five feet to the point of beginning.

3. On said date, the said Mrs. Fannie Paisley, to secure the payment of a note executed by her to Miss Pauline Schoenthal, for

Five Hundred and Fifty Dollars, with interest at eight per cent. per annum payable semi-annually, which said note matured on the 9th day of January, 1920, conveyed said property by security deed to the said Miss Pauline Schoenthal.

4. Subsequently on the 30th day of July, 1919, said Mrs. Paisley conveyed the same property by warranty deed to H. Calhoun Wilson, said conveyance being made subject to the loan deed referred to in [fol. 17] the preceding paragraph.

5. On the second day of October 1919, said H. Calhoun Wilson conveyed said property by warranty deed to petitioner, subject to the loan aforesaid.

6. In purchasing said property, petitioner acted in perfect good faith, and without any notice of any defect which may have existed in the deed from the said Mrs. Paisley to the said H. Calhoun Wilson, and petitioner was, as to said property, a bona fide purchaser without notice of any existing claims between the said H. Calhoun Wilson and any other person.

7. Sometime prior to the return day of the May Term, 1920, of the City Court of Atlanta, said Miss Pauline Schoenthal, through her attorneys, notified the said Mrs. Fannie Paisley of her intention to bring suit, returnable to the May Term 1920, of the City Court of Atlanta, on the note referred to in paragraph 3 of this petition, and to ask that the judgment rendered in said case include ten per cent. of principal and accrued interest as attorney's fees.

8. Said Miss Schoenthal did enter suit on said note, returnable to the May Term 1920, of the City Court of Atlanta, and said suit was served upon the said Mrs. Fannie Paisley, the defendant therein named.

9. On the second day of the said May Term, 1920, of said City Court of Atlanta, the said Mrs. Paisley having failed to interpose any defense to the said suit, the said case was entered in default.

10. Thereupon the said Miss Pauline Schoenthal on the 4th day of May, 1920 too- a verdict against said Mrs. Paisley, for principal, interest and attorney's fees due on said note, and finding in favor of a special lien on the property described in the loan deed mentioned in paragraph 3 of this petition.

11. On the same day, judgment was rendered in accordance with [fol. 18] said verdict, and execution issued on said judgment.

12. Thereafter, the said Miss Pauline Schoenthal executed to the said Paisley, as defendant in *fi. fa.*, a quit claim deed to the said property, for the purpose of levy and sale, filed the same in the office of the Clerk of the Superior Court of said County, and had the same recorded.

13. Thereupon, defendant James I. Lowry, Sheriff levied the execution aforesaid upon the property whereon a special lien was

declared, and proceeded to advertise the same for sale on the first Tuesday in June 1920.

14. At the time and place designated in said advertisement, said property was exposed for sale by defendant James I. Lowry, Sheriff; the same was bid in by defendant J. A. Paisley, husband of defendant Mrs. Fannie Paisley, and said defendant James I. Lowry executed a sheriff's deed conveying the said property to the said J. A. Paisley.

15. Said defendant J. A. Paisley, on or about the 15th day of August, 1921, undertook to convey the said property to defendant Claud Brackett, and said Brackett went into possession of said property, and remains in possession of the same.

16. Petitioner was not a party to the proceedings designed in paragraphs 7 to 14 of this petition, which resulted and terminated in the sale of said property at sheriff's sale by the defendant James I. Lowry, she had no notice of said proceedings, and she was afforded no opportunity during the course of said proceedings to assert and defend her right to the said property.

17. Petitioner charges that because of the facts set forth in the preceding paragraph, the said sale of said property by defendant Lowry, Sheriff, was, as to petitioner, illegal and void, and passed to defendant J. A. Paisley, none of the interest which petitioner owned and held in said property.

[fol. 19] 18. Petitioner charges, further, that the proceedings hereinbefore set out and described did not, as to petitioner, constitute due process of law within the purview of paragraph 3 of section 1 of article 1 of the Constitution of Ga., (Code section 6359) which provides that "No person shall be deprived of life, liberty or property, except by due process of law," and within the purview of that portion of Section 1 of Article 1 of the Fourteenth Amendment to the United States Constitution which provides, "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law;" that petitioner was not a party to said proceedings, had no notice thereof, and had no opportunity during the course of said proceedings to be heard in her own defense. And to allow said sale by defendant James I. Lowry, Sheriff, to divest petitioner of her interest in said property, would be to deprive her of said interest through judicial proceedings to which she was not a party, of which she had no notice, and in the course of which she had no opportunity to be heard, and thus to deprive her of her property without due process of law.

19. The only claim of defendant Claud Brackett to the said property is based upon the conveyance to him of said property by defendant J. A. Paisley, and the only interest which defendant Paisley had in said property at the time of his conveyance to defendant Brackett was that acquired through the sale aforesaid by defendant Lowry, Sheriff.

20. Petitioner has never sold or otherwise conveyed her interest in the said property.

21. Petitioner has no adequate remedy at law.

Wherefore, Waiving discovery, petitioner prays,

(a). That the sale by said defendant James I. Lowry, Sheriff be decreed to be null and void, as to petitioner and that the deed executed in pursuance of said sale be decreed to convey no part of [fol. 20] the interest held by petitioner in said property.

(b). That both the deed from defendant James I. Lowry, Sheriff to defendant J. A. Paisley, and the deed from defendant J. A. Paisley to defendant Claud Brackett, be decreed to convey only the interest theretofore held by Miss Pauline Schoenthal, plaintiff in the proceedings mentioned and described in this petition, to-wit: the legal title to said property to secure the loan mentioned in paragraph 3 of this petition.

(c). That petitioner be decreed to be the equitable owner of said property, with the right to the possession thereof, and to redeem the legal title by the payment of the incumbrance against the said property.

(d). That petitioner be awarded such other and further relief as to the Court may seem meet and proper in the premises.

(e). That process issue requiring each and all of the defendants herein named to be and appear at the next term of this Honorable Court to answer petitioner's complaint. And petitioner will ever pray.

Paul Donehoo, N. T. Anderson, Jr., Petitioner's Attys.

Sworn to by Dorothy Scott. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 21] IN SUPERIOR COURT OF FULTON COUNTY

DEMURRER—Filed March 23, 1923

Now comes Mrs. Fannie Paisley, Claud Brackett and Jas. I. Lowry, and demur to plaintiff's petition in said case, and for cause of demurrer says:

1. That there is no cause of action set forth in plaintiff's petition.
2. That there is no equity in plaintiff's petition.

McElreath & Scott, Attys. for Defts.

[File endorsement omitted.]

IN SUPERIOR COURT OF FULTON COUNTY

AMENDED PETITION—Filed March 27, 1923

Comes now the plaintiff in the above stated case, and by leave of the Court first obtained, amends her petition as originally filed, in the following particulars, to-wit:

1. By adding thereto, as paragraph 22, the following allegation: Said lot is worth Twenty-five Hundred Dollars, or other large sum greatly in excess of the incumbrance held by the said Miss Pauline Schoenthal against the same.

2. By adding to said petition, as a second count, the following: And for further and other cause of action, petitioner shows:

23. That J. A. Paisley, Mrs. Fannie Paisley, Claud Brackett and James I. Lowry, the defendants herein, are all residents of Fulton Co., Ga., the said J. I. Lowry being sheriff of said county and being *suit* as such.

24. On the 9th day of Jan. 1917, the said Mrs. Fannie Paisley owned all that tract or parcel of land lying and being in land lot 140 of the 14th District of Fulton County, Ga., and more particularly [fol. 22] described as beginning at a point on the east side of Atwood Street, in the City of Atlanta, one hundred and ninety nine and two-tenths feet south of the southeast corner of Atwood St., and Lucile Ave; 1 said beginning point being on the south side of a 15 foot alley which runs parallel with Lucile Ave., extending thence south, along the east side of Atwood St., 50 feet; thence east parallel with the alley aforesaid, one hundred and eighty-five feet; thence north parallel with Atwood Ave., fifty feet, to the south side of said alley, thence west along the south side of said alley, one hundred and eighty five feet to the point of beginning.

25. On said date, the said Mrs. Fannie Paisley, to secure the payment of a note executed by her to Miss Pauline Schoenthal for Five Hundred and Fifty Dollars, with interest at eight per cent per annum payable semi-annually, which said note matured on the 9th day of January, 1920, conveyed said property by security deed to the said Miss Pauline Schoenthal.

26. Subsequently on the 30th day of July, 1919, said Mrs. Paisley conveyed the same property by warranty deed to H. Calhoun Wilson, said conveyance being made subject to the loan deed referred to in the preceding paragraph.

27. On the second day of Oct., 1919, said H. Calhoun Wilson conveyed said property by warranty deed to petitioner, subject to the loan aforesaid.

28. In purchasing said property, petitioner acted in perfect good faith and without any notice of any defect in the title to said property because of any conflicting claim between the said H. Calhoun

Wilson, and the said Mrs. Paisley, or between the said H. Calhoun Wilson and any other person.

29. Some time prior to the return day of the May term, 1920 of the City Court of Atlanta, the said Miss Pauline Schoenthal, through [fol. 23] her attorneys, notified the said Mrs. Fannie Paisley, of her intention to bring suit, returnable to the May Term, 1920, of the City Court of Atlanta, on the note referred to in paragraph 25 of this petition, and to ask that judgment rendered in said case include ten per cent of principal and accrued interest as attorney's fees.

30. Miss Schoenthal did enter suit on said note, returnable to the May Term, 1920, of the City Court of Atlanta, and said suit was served upon the said Mrs. Fannie Paisley, the said defendant therein named.

31. On the second day of the said May Term, 1920, of said City Court of Atlanta, the said Mrs. Paisley having failed to interpose any defense to the said suit, said case was entered in default.

32. Thereupon the said Miss Pauline Schoenthal, on the 4th day of May, 1920, took a verdict against the said Mrs. Paisley for principal, interest and atty's fees, due on said note and finding in favor of a special lien on the property described in the loan deed mentioned in paragraph 25 of this petition.

33. On the same date, judgment was rendered in accordance with said verdict, and execution issued on said judgment.

34. Thereafter, the said Miss Pauline Schoenthal executed to the said Mrs. Paisley, as defendant in *fi. fa.*, a quit claim deed to the said property, for the purpose of levy and sale, filed the same in the office of the Clerk of the Superior Court of said County, and had the same recorded.

35. Thereupon, defendant James I. Lowry, Sheriff, levied the execution aforesaid upon the property whereon a special lien was declared, and proceeded to advertise the same for sale on the first Tuesday in June, 1920.

36. At the time and place designated in said advertisement, said [fol. 24] property was exposed for sale by defendant James I. Lowry Shff., the same was bid in by defendant J. A. Paisley, husband of the said Mrs. Fannie Paisley, and said defendant James I. Lowry executed a sheff's deed conveying the said property to the said J. A. Paisley.

37. Said defendant J. A. Paisley, on or about the 15th day of August, 1921, undertook to convey the said property to defendant Claud Brackett, and said Brackett went into possession of said property, and remains in possession of the same.

38. Petitioner was not a party to the proceedings described in paragraph 29 to 36 of this petition, which resulted and terminated in the sale of said property at shff's sale by the defendant James I.

Lowry; she had no notice of said proceedings, and she was afforded no opportunity during the course of said proceedings to assert and defend her right to the said property.

39. Petitioner avers that the levy upon said sale of said property by said James I. Lowry, Shff., under the facts and circumstances set forth in this petition, were without authority of law, were as to petitioner illegal and void, and passed none of the right, title or interest in said property held by petitioner.

40. The only pretense of legal authority for the said levy and sale is in the provisions of section 5037 of the Civil Code of Ga. which said section was codified from an Act of the General Assembly approved August 27th, 1872, entitled "An Act to Amend an Act Entitled an Act to Provide for the sales of property in this State to Secure Loans and Other Debts," as said act was amplified and enlarged by an Act approved December 17th, 1894, entitled "An Act to Provide for the Levy and Sale of Property Where the Defendant has an Interest Therein, but Does Not Hold the Legal Title."

41. Said section, as applied to a case in which the grantor in a loan deed, has, between the execution of said deed and the bringing [fol. 25] of suit to reduce the secured debt to judgment, disposed of his interest in the property covered by said deed to a third person, is in conflict with, and is repugnant to Paragraph 3 of Section 1 of Article 1 of the Constitution of Ga. (Code, section 6359) which provides that no person shall be deprived of life, liberty, or property, except by due process of law; in that said section provides that one who prior to the institution of proceedings brought to reduce the secured debt to judgment, acquires the interest of the grantor in a loan deed, may be divested of said interest by and through a proceeding to which he is not a party of which he is entitled to no notice, and in the course of which he is not a party, of which he is entitled to no notice, and in the course of which he has no opportunity to be heard in his own defense, and without any judicial proceedings against said owner of said equitable interest in the property: whereas due process of law requires that to divest the said owner of said interest by or through judicial proceedings, he must be a party to said proceedings, must have notice thereof, and an opportunity during said proceedings to assert and defend his rights to the said property.

42. Petitioner charges further that said section as applied to a case in which the grantor in a security deed has, between the execution of said deed and the bringing of suit to reduce the secured debt to judgment, disposed of his interest in the property covered by said deed to a third person, is in conflict with and is repugnant to Paragraph 4 of Section 1 of Article 1 of the Constitution of Ga., (Code section 6360) which provides that no person shall be deprived of the right to prosecute or defend his cause in any of the Courts of this State in person, by attorney, or both: in that said section provides that one who prior to the institution of proceedings brought to reduce the secured debt to judgment, acquires the interest of the grantor in

a loan deed, if he may defend against the taking of his property at all, must do so by or through the grantor in said loan deed, and [fol. 26] that he may not defend said cause in person, as guaranteed by said provision of the Constitution.

43. Petitioner charges, further, that said section of the Code, to-wit: Section 6037, is in conflict with, and is repugnant to Paragraph 23 of Section 1 of Article 1 of the Constitution of Ga. (Code, Section 6379) which provides that the legislative, judicial and executive powers shall forever remain separate and distinct; in that said section constitutes an attempt on the part of the Legislature to make an adjudication upon the sole question of indebtedness conclusive as to the liability of specific property, whether in the hands of the defendant or of another, to the payment of said indebtedness and this to strip the courts of their right, function and duty, to inquire into other facts which are essential to the existence of such liability of specific property of the payment of said indebtedness.

44. Petitioner charges further that said section 6037 of the Code, as applied to a case in which the grantor in a security deed has, between the execution of said deed and the bringing of suit to reduce the secured debt to judgment disposed of his interest in the property covered by said deed to a third person, is in conflict with, and is repugnant to that portion of Section 1 Article 1 of the 14 Amendment to the Constitution of the U. S. (Code, Section 6700) which provides "Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws", in that said section provides that one who prior to the institution of suit brought to reduce the secured debt to judgment, acquires the interest of the grantor in a loan deed, may be divested of said interest without judicial proceedings against said owner, and by and through a proceeding to which said owner is not a party of which he is entitled [fol. 27] to no notice, and in the course of which he is afforded no opportunity to be heard in his own defense; whereas due process of law requires that to divest said owner of said interest by or through judicial proceedings he must be made a party to said proceedings, must have notice thereof, and must be afforded an opportunity during said proceedings, to assert and defend his right to the said property.

45. Petitioner charges, further, that said section 6037 of the Code, as applied to a case in which the grantor in a security deed has, between the execution of said deed and the bringing of suit to reduce the secured debt to judgment, disposed of his interest in the property covered by said deed to a third person, is in conflict with, and is repugnant to the aforesaid provisions of Section 1 of the Article 1 of the 14th Amendment to the Constitution of the United States, (Code, section 6700); in that said section denies to one who prior to the institution of suit brought to reduce the secured debt to judgment, the right to interpose defenses to the taking of his property under said suit, which could be set up by the grantor in the security deed

if he owned the property, and this denies to such person, acquiring the interest of said grantor in a loan deed, the equal protection of the the laws.

46. Because the unconstitutionality of the statute under which said levy and sale were made by said defendant Lowry, Sheriff, said sale by said defendant Lowry, Sheriff, was illegal and void, and passed to the purchaser at said sale, none of petitioner's right, title or interest in or to the property described in paragraph 24 of this petition.

47. The claim of defendant Claud Brackett to the said property is based upon the conveyance to him of said property by defendant J. A. Paisley, and the only interest which defendant J. A. Paisley had in said property at the time of his conveyance to defendant [fol. 28] Brackett was that acquired through the sale aforesaid by defendant Lowry, Sheriff.

48. Petitioner has never sold, or otherwise conveyed her interest in said property.

49. The lot herein described is worth Twenty Five Hundred Dollars or other large sum, greatly in excess of the incumbrance held by the said Miss Pauline Schoenthal against the same.

50. Petitioner has no adequate remedy at law.

Wherefore, waiving discovery, petitioner prays.

(a). That the sale by said defendant James I. Lowry, Sheriff, be decreed to be null and void as to petitioner, and that the deed executed in pursuance of said sale be decreed to convey no part of the interest held by petitioner in said property.

(b). That both the deed from defendant James I. Lowry, Sheriff, to defendant J. A. Paisley, and the deed from defendant J. A. Paisley to defendant Claud Brackett, be decreed to convey only the interest theretofore held by Miss Pauline Schoenthal, plaintiff in the proceedings mentioned and described in this petition, to-wit: the legal title to said property to secure the loan mentioned in paragraph 25 of this petition.

(c). That petitioner be decreed to be the equitable owner of said property, with the right to the possession thereof, and to redeem the legal title by the payment of the incumbrance against the said property.

(d). That petitioner be awarded such other and further relief as to the Court may seem meet and proper in the premises.

(e). That process issue requiring said defendants and each of them to be, and appear at the next term of this Honorable Court, to answer petitioner's complaint.

Paul Donahoo, N. T. Anderson, Jr., Petitioner's Attys.

[fol. 29] Sworn to by Dorothy Scott. Jurat omitted in printing.

Allowed and ordered filed, subject to objection and demurrer.
This March 27th, 1923.

Geo. L. Bell, Judge S. C. A. C.

Service of the foregoing amendment is acknowledged, copy received. All other or further service waived, but right reserved to object to allowance.

This 27th day of March, 1923.

McElreath & Scott, Attys. for Paisley, Brackett & Lowry
(Sheriff). J. S. Holliday, D. Clk.

[fol. 30] IN SUPERIOR COURT OF FULTON COUNTY

AMENDED PETITION—Filed May 29, 1923

Comes now the plaintiff in the above stated case, and by leave of the Court first obtained, amends her petition as originally filed by striking therefrom Paragraph 17, and inserting in lieu thereof the following: Petitioner charges that by reason of the facts set forth in the preceding paragraph, said sale conveyed none of petitioner's right, title or interest in or to said property to the said J. A. Paisley. Notwithstanding, said defendant J. A. Paisley held said property adversely to petitioner from the time of said sheriff's sale until his conveyance thereof to said defendant Brackett, and said defendant Brackett has since said last mentioned conveyance, held said property adversely to your petitioner.

Paul Donehoo, N. T. Anderson, Jr., Petitioner's Attys.

Sworn to by Dorothy Scott. Jurat omitted in printing.

Allowed and ordered filed subject to demurrer.

E. D. Thomas, Judge S. C. A. C.

This 28th day of May, 1923.

[File endorsement omitted.]

[fol. 31] IN SUPERIOR COURT OF FULTON COUNTY

JUDGMENT

The foregoing demurrer coming on to be heard and the plaintiff having amended her petition and the defendants having renewed their demurrer to the petition as amended, after argument of counsel thereon, said demurrer is hereby sustained and plaintiffs petition dismissed with cost of court on the plaintiff.

This June 8th, 1923.

Geo. L. Bell, Judge S. C. A. C.

IN SUPERIOR COURT OF FULTON COUNTY

CLERK'S CERTIFICATE—Filed July 26, 1923

I Hereby Certify, That the foregoing pages, hereunto attached, contain a true Transcript of such parts of the record as are specified in the Bill of Exceptions and required, by the order of the Presiding Judge, to be sent to the Supreme Court of Georgia, in the case of Dorothy Scott, Plaintiff in Error, vs. J. A. Paisley et al., Defendant-in-Error.

I, further certify that on account of the volume of work in office I have been unable to make up and transmit the within record in the time prescribed by law.

Witness my signature and the seal of Court affixed this the 23 day of July 1923.

Arnold Broyles, Clerk Superior Court Fulton County,
Georgia, ex Officio Clerk City Court of Atlanta. (Seal.)

[fol. 32] [File endorsement omitted.]

[fol. 33] IN SUPREME COURT OF GEORGIA

OPINION

PET CURIAM:

Where property encumbered by a deed to secure a debt, under the provisions of the Civil Code, § 3306, was sold, subject to such security deed, by the grantor to a third person, who paid all of the purchase-price except the secured debt which the purchaser assumed and agreed to pay, and took a bond for title from the grantor, and thereafter the grantee in the security deed sued his debtor, the grantor, and obtained a judgment for the amount of the indebtedness so secured, and a special lien upon the property conveyed as security, even though the holder of the bond for title was not made a party to the suit or otherwise notified thereof, the equitable interest of the holder of the bond for title is divested by a sale made in compliance with the terms of § 4037 of the Code under the fi. fa. issued on said judgment. Such proceeding did not violate the fourteenth amendment to the constitution of the United States, and the similar provision of our State constitution, which declares that "no person shall be deprived of life, liberty, or property, without due process of law."

Judgment affirmed. All the Justices concur, except Russell, C. J., dissenting.

[fol. 34] The petition of Dorothy Scott alleged in substance as follows: Fannie Paisley, the owner of a certain described tract of land, on January 9, 1917, conveyed said property by security deed

to Pauline Schoenthal to secure the payment of a note executed by her to Miss Schoenthal for \$550, which note matured on January 9, 1920. On July 30, 1919, Mrs. Paisley conveyed the same property by warranty deed to H. Calhoun Wilson, the conveyance being made subject to the above-mentioned security deed. On October 2, 1919, Wilson conveyed said property to petitioner by warranty deed subject to the aforesaid loan. In this purchase petitioner acted in good faith and without notice of any defect which may have existed in the deed from Mrs. Paisley to Wilson. Sometime prior to the return day of the May term, 1920, of the city court of Atlanta, Miss Schoenthal gave notice to Mrs. Paisley that she would bring suit upon the note to said term, and would ask that the judgment rendered include ten per cent. as attorney's fees. She did so enter suit; and on the second day of said term, Mrs. Paisley having failed to interpose any defense to the suit, the same was entered in default. On May 4, 1920, Miss Schoenthal took a verdict against Mrs. Paisley for principal, interest, and attorney's fees due on said note, with a finding of a special lien on the property described in the security deed; and judgment was rendered and execution issued in accordance with such verdict. Thereafter Miss Schoenthal executed to Mrs. Paisley, as defendant in *fi. fa.* a quitclaim deed to the property, for the purpose of levy and sale, which was properly filed and recorded. The sheriff levied the execution on the property, and advertised it for sale on the first Tuesday in June, 1920, when it was sold and was bid in by J. A. Paisley, husband of Fannie Paisley, and the sheriff executed a deed conveying the property to J. A. Paisley. On or about August 15, 1921, Paisley undertook to convey the property to Claud Brackett, [fol. 35] who took and now holds possession. Petitioner was not a party in the above proceedings, had no notice of them, and was afforded no opportunity to assert and defend her right to said property during the course of said proceedings, and because of her want of notice and opportunity to defend the sale was illegal and void as to her, and passed to Paisley none of the interest which petitioner owned in said property; for which reasons the proceedings hereinbefore set out did not, as to her, afford due process of law within the purview of art. 1, sec. 1, par. 3, of the constitution of Georgia and the like provisions of the Constitution of the United States. "And to allow said sale * * * to divest petitioner of her interest in said property would be to deprive her of said interest through judicial proceedings to which she was not a party, of which she had no notice, and in the course of which she had no opportunity to be heard, and thus to deprive her of her property without due process of law." The only claim of Brackett to the property is based upon the conveyance to him by Paisley, and the only interest that Paisley had at the time of his conveyance was that acquired through the sheriff's sale. Petitioner has never sold or otherwise conveyed her interest. She has no adequate remedy at law. She prays, that the sale by the sheriff be decreed to be null and void as to her; that the sheriff's deed be decreed to convey no part of her interest; that both the deeds from the sheriff to Paisley and from Paisley to Brackett

be decreed to convey only the interest theretofore held by Miss Schoenthal, to wit, the legal title to the property to secure the loan; that petitioner be decreed to be the equitable owner of the property, with the right to possession and to redeem the legal title by the payment of the incumbrance; for other and further relief, and for process.

[fol. 36] The defendants demurred to the petition that no cause of action was set forth, and that there was no equity in the petition.

The petitioner offered an amendment alleging that "Said lot is worth twenty-five hundred dollars or other large sum greatly in excess of the incumbrance held by the said Miss Pauline Schoenthal against the same," and adding a second count in which, after making the same allegations as in the original petition, she alleged that section 6037 of the Civil Code, "as applied to a case in which the grantor in a security deed has, between the execution of said deed and the bringing of suit to reduce the secured debt to judgment, disposed of his interest in the property covered by said deed to a third person," is unconstitutional, because in such case such third person is deprived of his property without due process of law, in violation of the State and Federal constitutions, in that said section provides that the interest of such third person may be divested by a proceeding to which he is not a party, of which he has no notice, and in which he has no opportunity to be heard in his own defense, and without any judicial proceeding against him; and because said section is in conflict with art. 1, sec. 1, par. 4, of the constitution of Georgia, in that it provides that in such case, if said third person may defend at all, he must do so by or through the grantee in the loan deed, and cannot defend the cause in person; and because said section is violative of the provision of the constitution that the legislative, judicial, and executive powers shall forever remain separate and distinct, in that it constitutes an attempt on the part of the legislature to make an adjudication upon the sole question of indebtedness conclusive as to the liability of specific property, whether in the hands of the defendant or of another, to the payment of said indebtedness, and thus to strip the [fol. 37] courts of their right, function, and duty to inquire into other facts which are essential to the existence of such liability; and because said section is violative of the 14th amendment to the constitution of the United States, in that it denies to such third person the right to interpose defenses to the taking of his property under said suit, which could be set up by the grantor in the security deed if he owned the property, and this denies to such person acquiring the interest of said grantor the equal protection of the laws. The petitioner says that for these reasons the sale by the sheriff was illegal and void and passed none of her right, title, or interest in the property to the purchaser at that sale. The further allegation was made Paisley held said property adversely from the time of the sheriff's sale to the time of his conveyance to Brackett, and that Brackett has since held said property.

The defendants renewed their demurrer to the petition as amended. The trial judge sustained the demurrer and dismissed the suit, and exception was taken to this order.

[fol. 38]

IN SUPREME COURT OF GEORGIA

JUDGMENT—September 30, 1924

The Honorable Supreme Court met pursuant to adjournment.
The following judgment was rendered:

DOROTHY SCOTT

v.

J. A. PAISLEY et al.

This case came before this court upon a writ of error from the Superior Court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur, except Russell, C. J., dissenting.

Bill of costs, \$15.00.

[fol. 39]

IN SUPREME COURT OF GEORGIA

CLERK'S CERTIFICATE

Atlanta, Ga., January 13, 1925.

I hereby certify that the foregoing pages hereto attached contain the original writ of error, and the original citation, together with true and complete copies of the parts of the record specified in the præcipe in the case of Dorothy Scott, plaintiff in error, vs. J. A. Paisley et al., defendants in error, as appears from the records and files of the Supreme Court of Georgia now in this office.

Witness my signature and the seal of the Supreme Court of the State of Georgia hereto affixed the day and year first above written.

W. E. Talley, Deputy Clerk Supreme Court of the State of Georgia. (Seal of the Supreme Court of the State of Georgia.)

Endorsed on cover: File No. 30,822. Georgia Supreme Court. Term No. 253. Dorothy Scott, plaintiff in error, vs. J. A. Paisley, Mrs. Fannie Paisley, Claud Brackett, et al. Filed January 21, 1925. File No. 30,822.